Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

76-1911

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No.

ROBERT F. AHEARN ET AL.,
APPELLANTS,

v.

ROBERT J. DI GRAZIA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
THREE-JUDGE COURT.

Jurisdictional Statement.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
THREE-JUDGE COURT.

Jurisdictional Statement.

The Opinions Below.

The memorandum decision of the United States District Court for the District of Massachusetts (Three-Judge Court), as yet unreported, appears herein as Appendix B, *infra*. The memorandum decision of the United States District Court for the District of Massachusetts on the appellants' motion for a temporary restraining order and request to convene a Three-Judge Court is unreported, and appears at Appendix A, *infra*. No other written opinions have been delivered.

Jurisdiction.

This action was instituted by appellants in the United States District Court for the District of Massachusetts under 28 U.S.C. §§ 1343(3), 2281, 2284 and 42 U.S.C. § 1983 to enjoin the appellee from imposing punishment duty pursuant to M.G.L. c. 31, § 43(g), and to declare M.G.L. c. 31, § 43(g), unconstitutional and unenforceable.

On May 6, 1976, a Three-Judge Court, convened pursuant to 28 U.S.C. §§ 2281 and 2284, filed an opinion holding that M.G.L. c. 31, § 43(g), is constitutional. A notice of appeal to this Court was filed on May 19, 1976. The jurisdiction of this Court to review the decision of the District Court on direct appeal in conferred by 28 U.S.C. § 1253.

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Amendment XIV:

> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Massachusetts General Laws, chapter 31, § 43(g):

> "(g) Punishment duty shall not be imposed without just cause upon any police officer or fire fighter subject to this chapter. A police officer or fire fighter upon whom

> punishment duty is imposed shall, within twenty-four hours of the imposition of such punishment duty, be given a copy of this section and of section forty-five, together with a written notice stating the specific reason for the imposition of such punishment duty and the duration thereof and informing him that he may, within forty-eight hours of receipt of such notice, request in writing a hearing by the appointing authority, and if he so requests he shall be given a hearing within five days of receipt of such request by the appointing authority. A copy of the notice of imposition of punishment duty shall be forwarded forthwith to the personnel administrator. Whenever such hearing is given, the appointing authority shall give the police officer or fire fighter upon whom the punishment duty is imposed a written notice of his finding within two days after the hearing. If, after such hearing, the appointing authority finds no just cause exists for the imposition of punishment duty, such punishment duty shall be deemed not to have been imposed; if, after such hearing, the appointing authority finds that just cause does exist for the imposition of punishment duty, the police officer or fire fighter upon whom the punishment duty is imposed may appeal to the commission as provided in paragraph (b), and he or the appointing authority shall be entitled to judicial review of the action taken by the commission as provided in paragraph (d). The provisions of paragraph (c) shall apply to all hearings under this paragraph. Notice of any action taken by the appointing authority under this paragraph shall be forwarded forthwith to the personnel administrator."

Questions Presented.

1. Whether the imposition of punishment duty which consists of forced labor without compensation as a condition of continued employment on police officers and firemen as authorized by M.G.L. c. 31, § 43(g), is repugnant to the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the imposition of punishment duty pursuant to M.G.L. c. 31, § 43(g), which neither provides for review at a meaningful time and in a meaningful manner nor limits the amount of punishment duty that may be imposed in aggregate or in a given day is in violation of the Due Process Clause of the Fourteenth Amendment.

Statement of the Case.

The facts in this case are not disputed. The appellee, the police commissioner of the city of Boston, had imposed punishment duty in the form of 80 hours of overtime duty without pay upon the appellants, who are four Boston police officers. The imposition of forced overtime without pay as punishment duty is authorized by M.G.L. c. 31, § 43(g). It is applicable to policemen and firemen, but to no other kinds of public employees. On October 22, 1975, the appellants filed a civil action in the United States District Court for the District of Massachusetts pleading the unconstitutionality of M.G.L. c. 31, § 43(g), and requesting the convening of a Three-Judge Court to hear said constitutional challenge.

On January 9, 1976, the court below ordered the convening of a Three-Judge Court and granted the appellants' request for a temporary restraining order to prevent the imposition of punishment duty pursuant to M.G.L. c. 31, § 43(g) (Appendix A). On April 28, 1976, the Three-Judge Court convened and heard oral argument. The Three-Judge Court issued a memorandum decision on May 6, 1976, dismissing the appellants' constitutional challenge of M.G.L. c. 31, § 43(g), and vacating the temporary restraining order (Appendix B).

On May 13, 1976, the appellants requested an injunction from the Three-Judge Court for the purpose of perfecting their appeal to this Court pursuant to 28 U.S.C. § 1253. On May 21, 1976, the appellants' request for injunctive relief was denied (Appendix C). On June 1, 1976, the appellants applied to this Court for a stay of the Three-Judge Court judgment pending perfection of their appeal pursuant to 28 U.S.C. § 1253. On the same day, Justice William J. Brennan, Jr., denied the appellants' application for a stay (Appendix D).

The Questions Presented are Substantial.

The questions presented by this appeal are of substantial importance to the type of discipline a governmental employer may impose on police officers and firefighters. M.G.L. c. 31, § 43(g), singles out the aforesaid civil service employees for the imposition of punishment duty which must be performed as a condition of their continued employment. A similar statute cannot be found in any other jurisdiction.

The District Court's application of the rationality standard as employed by this Court in testing the constitutionality of a state statute was in error in the instant case. The District

Court's reliance on *Kelley* v. *Johnson*, 44 U.S.L.W. 4469 (April 5, 1976), a recent decision of this Court, was misplaced and constituted a misinterpretation of the rationality standard. Simply stated, the District Court's decision holds that a police officer, by virtue of his employment, is *per se* precluded from *ever* having standing to raise an equal protection challenge of a state statute.

In *Kelley*, of *critical* importance to this Court in sustaining a hair regulation for a municipal police department was the present existence of a de facto uniformity in appearance for the overwhelming majority of state and local police attributed to the wearing of a uniform. On the basis of this fact, this Court ruled that an apparent conscious decision has been made by state and local authorities that "similarity in appearance of police officers is desirable." *Kelley*, *supra*, at 4472. Thus, this Court concluded in *Kelley*, that a rational justification for a hair regulation for a municipal police department had been made so as to defeat a Fourteenth Amendment challenge.

In the instant case, there does not exist in other jurisdictions a disciplinary statute which imposes punishment duty for policemen and firemen or for any other civil service employees. In contrast to the *Kelley*, situation, no justification exists for M.G.L. c. 31, § 43(g), on the basis of the practice in other municipalities.

It is further contended that to conceive a justification, as the court below did, for punishment duty in contrast to the usual sanction of suspension from duty, on the basis that a suspension may have the effect of reducing available manpower in a period of an emergency, is unwarranted. There already exists in the Boston police department as well as in other state and local police departments complete and detailed provisions as to the deployment of police personnel during

emergency situations. The promotion of safety of persons and property is not advanced by the imposition of punishment duty during an emergency situation.

The imposition of punishment duty is in direct contrast to an emergency situation. The appellants are compelled to perform 80 hours of work without pay as a condition of their continued employment, regardless of the existence of an emergency. Presumably, if an emergency situation arose during the performance of the said punishment duty, the hours of overtime which the appellants had to work would not be credited to their punishment duty, but rather would be considered paid overtime. It should also be noted that emergency overtime applies to all patrolmen alike, whereas punishment duty, by its very nature, is directed to a particular individual.

The contention, as noted by the court below, that punishment duty may also be justified on the basis of the usual sanction of suspension from duty places an inappropriate economic burden on the policeman's family is equally frivolous. It is totally inconceivable for a statute such as M.G.L. c. 31, § 43(g), to be enacted so that a policeman's or a firefighter's family could be protected while at the same time disciplinary action is taken. Furthermore, if protection of the family is the justification for M.G.L. c. 31, § 43(g), what justification exists to impose punishment duty rather than a suspension on single policemen and firemen? Even assuming, *arguendo*, the validity of M.G.L. c. 31, § 43(g), due to the purported family rationale, what justification exists for limiting the concern to the families of policemen and firefighters and not to the families of other governmental employees? Finally, M.G.L. c. 31, § 43(g), provides no guidelines as to when the appointing authority may impose punishment duty in the interest of the employee's family and when he is required to resort to the usual sanction of suspension.

Thus, in accord with the rationality standard adopted by this Court, see, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71 (1971); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *James* v. *Strange*, 407 U.S. 128 (1972); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), it is the appellants' contention that M.G.L. c. 31, § 43(g), lacks a rational relationship to its presumed stated objective of special disciplinary procedures for policemen and firemen. The classification set forth by M.G.L. c. 31, § 43(g), serves only to degrade and humiliate the public employees subjected to it. In light of the existence of several types of disciplinary actions already permitted under M.G.L. c. 31, § 43, the dissimilar treatment given to policemen and firemen under M.G.L. c. 31, § 43(g), bears no rational relation to the presumed purpose of special disciplinary action for these civil service employees. Therefore, the classification set forth by M.G.L. c. 31, § 43(g), must fail as being in violation of the Equal Protection Clause as well as the Due Process Clause of the Fourteenth Amendment. The conceived justifications for M.G.L. c. 31, § 43(g), set forth by the court below are so clearly without merit that review by this Court is warranted.

Conclusion.

The questions presented by this appeal are substantial and of public importance. The case is one of first impression. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

ROBERT F. AHEARN, ET AL.,
PLAINTIFFS,

v.

CIVIL ACTION
No. 75-4419-S

ROBERT J. DI GRAZIA,
DEFENDANT.

Memorandum and Order on Motion for Temporary Restraining Order and Request to Convene a Three-Judge Court.

January 9, 1976.

SKINNER, D. J.

The facts are undisputed. The defendant Police Commissioner of Boston has imposed punishment duty in the form of 80 hours of overtime without pay upon the plaintiffs, who are four Boston patrolmen. The imposition of forced overtime without pay as punishment is inferentially authorized by M.G.L. c. 31 § 43(g). It is applicable to policemen and firemen, but to no other kinds of public employees.

The plaintiffs claim that the statute is unconstitutional on two grounds, and seek the convening of a three-judge court so that its enforcement may be enjoined. 28 U.S.C. § 2281. The first is that punishment duty is involuntary servitude in violation of the Thirteenth Amendment of the Constitution, and the second is that the statute violates the Equal Protection Clause of the Fourteenth Amendment.

This Court is not obliged to apply for the convening of a three-judge court unless it is satisfied that there is a substantial federal question. There is no substantial federal question under the Thirteenth Amendment, since any of the plaintiffs may avoid punishment duty by resigning from the police force. *United States* v. *Shackney*, 333 F.2d 475, 476-477 (2nd Cir. 1964).

A large number of cases hold that by reason of the nature of a policeman's duty he may be subject to regulations and disciplinary procedures which are different from those imposed on other public employees. In each case, however, this holding has been dependent upon a showing by the superior authority of some reasonable relationship between the police function and the regulation involved. *Gardner* v. *Broderick*, 392 U.S. 273, 277-278 (1968); *Owen* v. *Barry*, 483 F.2d 1126 (2nd Cir. 1973); *Board of Selectmen of Framingham* v. *Civil Service Comm.*, 321 N.E.2d 649 (1974). Consequently, the issue cannot be disposed of summarily. There are no cases with respect to this particular kind of disciplinary provision and it, therefore, cannot be said that the law is so settled that there remains no open substantial federal question.

While there is a pending proceeding before the Civil Service Commission concerning the appropriateness of the penalty and the sufficient cause for its imposition, it is not likely that those proceedings will resolve the issue presented here. Furthermore, the resolution of any issue of abstention or equitable restraint is properly left for a three-judge court. *Apel* v. *Murphy*, _____ F.2d _____ (1st Cir. December 1, 1975).

Accordingly, I shall refer this matter to the Chief Judge of the Circuit for the convening of a three-judge court.

The plaintiffs have also sought a temporary restraining order. Since the issue raised by the equal protection claim is an open question of law, as I see it, I cannot fairly say that I believe the plaintiffs have a likelihood of success on the merits.

The argument, however is not frivolous, and if a temporary restraining order is not entered the plaintiffs' case is very likely to become moot before it can be considered by a three-judge court.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that the defendant be temporarily restrained from requiring the plaintiffs to perform punishment duty in the form of uncompensated overtime until further order of the Court.

WALTER JAY SKINNER,
United States District Judge.

Appendix B.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

ROBERT F. AHEARN, ET AL.,
PLAINTIFFS,

v.

ROBERT J. DI GRAZIA,
DEFENDANT.

CIVIL ACTION
No. 75-4419-S

Before CAMPBELL, Circuit Judge, FREEDMAN and SKINNER, District Judges.

Memorandum and Order.

May 6, 1976.

SKINNER, D. J.

The plaintiffs, all police officers of the City of Boston, claim that they have been deprived of equal protection of the law by reason of the imposition on them of punishment duty pursuant to Massachusetts General Laws, c. 31, § 43(g), and bring this claim under the Civil Rights Act, 42 U.S.C. § 1983. Since they seek to enjoin the operation of the Massachusetts statute, a three-judge district court was designated on January 14, 1976 by the Chief Judge of the Circuit, in accordance with 28 U.S.C. §§ 2281 and 2284.

The thrust of the plaintiffs' claim is that only police officers and firefighters are singled out for this form of punishment. No other civil service employee of the Commonwealth may be subjected to punishment duty.

An additional claim under the Thirteenth Amendment and 42 U.S.C. § 1994 was dismissed by a district judge prior to the convening of the three-judge court.

There is no dispute as to the facts. After a hearing conducted in accordance with M.G.L. c. 31 § 43(g), the defendant Police Commissioner found the plaintiffs guilty of violating specified rules and regulations of the Boston Police Department and imposed punishment duty. Punishment duty consists of performing extra hours of police work without pay. An appeal was taken to the Massachusetts Civil Service Commission, which is still pending. The district judge issued a temporary order restraining the performance of the duty in order to preserve the issue for this Court.

The standard to be applied has recently been clarified by the United States Supreme Court. The plaintiffs must demonstrate that there is no rational connection between the provision for enforcing discipline through punishment duty and the promotion of safety of persons and property. *Kelley* v. *Johnson*, 44 U.S.L.W. 4469, 4472 (April 5, 1976).

"The job of a policeman does have 'natural distinguishing characteristics' from all other city employees." *Detroit Police Officers Association* v. *City of Detroit*, 385 Mich. 519, 190 N.W. 2d 97 (1971), *appeal dismissed for want of substantial federal question*, 405 U.S. 950 (1972).

Defendant has pointed out that the usual sanction of suspension from duty may place an inappropriate economic burden on the policeman's family, or may have the effect of reducing the available manpower in a period of emergency. Where, as in this case, the infractions consist of unauthorized absence from duty, suspension compounds the problem from the viewpoint of protection of persons and property. The defendant argues that Massachusetts was therefore justified in providing an alternate sanction by punishment duty.

We agree that these considerations demonstrate a rational relationship to the protection of persons and property, and that this relationship is at least as strong as that of the hair length regulation sustained in *Kelley* v. *Johnson*, *supra*, and that of the residence requirement in *Detroit Police Officers Association* v. *City of Detroit*, *supra*. Plaintiffs argue that no other state imposes punishment duty as does Massachusetts. The state is entitled to make its own choice if the standard or rational connection is met, as we hold it is here. *Kelley* v. *Johnson*, *supra*.

Accordingly, the Temporary Restraining Order is VACATED, and the Complaint is DISMISSED on the merits. So ordered.

LEVIN H. CAMPBELL,
Circuit Judge.

FRANK H. FREEDMAN,
District Judge.

WALTER JAY SKINNER,
District Judge.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

ROBERT F. AHEARN, ET AL.,
PLAINTIFFS,

v.

ROBERT J. DI GRAZIA,
DEFENDANT.

CIVIL ACTION
No. 75-4419-S

Before CAMPBELL, Circuit Judge, FREEDMAN and SKINNER, District Judges.

Judgment of Dismissal.

May 6, 1976.

SKINNER, D. J.

This action came on for argument, the facts having been stipulated, and upon due consideration thereof, it is ORDERED, ADJUDGED and DECREED that the defendant recover of the plaintiffs his costs of action.

LEVIN H. CAMPBELL,
Circuit Judge.

FRANK H. FREEDMAN,
District Judge.

WALTER JAY SKINNER,
District Judge.

Appendix C.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

ROBERT F. AHEARN, ET AL.,
PLAINTIFFS,

v.

ROBERT J. DI GRAZIA,
DEFENDANT.

CIVIL ACTION
No. 75-4419-S

Before CAMPBELL, Circuit Judge, FREEDMAN and SKINNER, District Judges.

Order.

May 21, 1976.

SKINNER, D. J.

The plaintiffs' motion for an injunction pending appeal from the Order dismissing the Complaint is DENIED.

LEVIN H. CAMPBELL,
Circuit Judge.

FRANK H. FREEDMAN,
District Judge.

WALTER JAY SKINNER,
District Judge.

Appendix D.

SUPREME COURT OF THE UNITED STATES.
OFFICE OF THE CLERK.
WASHINGTON, D. C. 20543

June 1, 1976

Frank J. McGee, Esquire
1952 Ocean Street
Marshfield, Massachusetts 02050

RE: Robert F. Ahearn, et al. v. Robert J. Grazia, No. A-1055

Dear Mr. McGee:

Your application for stay in the above-entitled case has been presented to Mr. Justice Brennan, who has endorsed thereon the following:

"Denied
Wm. J. Brennan, Jr.
6/1/76."

Very truly yours,
MICHAEL RODAK, JR., *Clerk*,
By PETER K. BECK,
Assistant Clerk.

Supreme Court, U. S.
FILED
SEP 15 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1911.

ROBERT F. AHEARN, ET AL.,
APPELLANTS,
v.
ROBERT J. DI GRAZIA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
THREE JUDGE COURT.

Motion to Dismiss or Affirm.

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Supreme Court of the United States.

OCTOBER TERM, 1976.

ROBERT F. AHEARN, ET AL.,
APPELLANTS,
v.
ROBERT J. DI GRAZIA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
THREE JUDGE COURT.

Motion to Dismiss or Affirm.

The Appellee moves the Court to dismiss or affirm on the grounds that the appeal is not within the jurisdiction of this Court and that the question presented is so unsubstantial as not to need further argument.

Questions Presented.

1. Whether the Massachusetts Civil Service administrative procedures which provide for review of the imposition of extra punishment duty and a remedy for obtaining back pay for performance of such duties, constitute an adequate remedy at law.

2. Whether the imposition of extra punishment duty constitutes irreparable harm, in light of the fact that employees who perform such duties have an available remedy for receiving back pay.

3. Whether a State Civil Service disciplinary statute which only applies to police and firemen creates a suspect classification or interferes with a fundamental federal right so as to require the application of strict scrutiny equal protection analysis.

4. Whether a Civil Service disciplinary statute which applies only to police and firemen bears a rational relation to a legitimate public purpose.

Statement of the Case.

The appellants are four Boston police officers who were ordered to work extra duty without pay pursuant to Mass. Gen. Laws c. 31, § 43(*g*). In accordance with that statute the appellee, the Police Commissioner of the City of Boston, notified the appellants of a hearing on the charges and specifications filed against them. That notice informed the appellants that he appellee was considering imposing punishment duty. After a hearing the appellee notified the appellants that they were ordered to work punishment duty.

The appellants filed a civil action in the United States District Court for the District of Massachusetts requesting the convening of a Three-Judge Court to hear a challenge to the constitutionality of Mass. Gen. Laws c. 31, § 43(*g*). On January 9, 1976 a single judge ordered a Three Judge Court to convene and issued a temporary restraining order to prevent the imposition of punishment duty. The Three Judge Court issued a memorandum decision on May 6, 1976 dismissing the appellants' constitutional challenge to Mass.

Gen. Laws c. 31, § 43(*g*) and vacating the temporary restraining order.

Argument.

I. The Court Below Lacked Jurisdiction because There Is No Basis for Issuing an Injunction.

This court does not have jurisdiction unless the Three Judge Court below had a basis upon which to issue an injunction against the enforcement of the State statute. The only necessity for forming such a court is to issue an injunction. 28 U.S.C. § 2281. In this case no injunction could issue since (i) the appellants cannot demonstrate the existence of irreparable harm and (ii) the appellants have an adequate and available administrative remedy at law. See *Huffman* v. *Pursue, Ltd.*, 43 U.S.L.W. 4379, 95 S. Ct. 1200 (1975); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561 (1975). See also *American Federation of Labor* v. *Watson*, 327 U.S. 582 (1946).

A. The Appellants have Not Demonstrated the Existence of Irreparable Injury because They Will Receive Payment for the Punishment Duty If Their Appeals Are Successful.

The work that the appellants will be required to perform is punishment only because they will not be receiving pay for that work. It is not because the work is any more arduous, dangerous or fatiguing than that which he must customarily perform as a patrolman. The punishment duty provisions of the Civil Service laws, Mass. Gen. Laws c. 31, § 43(*g*), may not be interpreted as permitting the police commissioner to order a patrolman to perform work outside of the Civil Service job description for patrolmen.

Also, the rules and regulations of the Boston Police Department governing a punishment duty provide that such duty must be assigned so that each appellant "shall not suffer undue fatigue . . . and he shall not be compelled to do more than seven consecutive hours of punishment duty at any time, or more than fourteen hours in four consecutive days, or more than twenty-one hours in seven consecutive days (nor) . . . within two hours before or after a tour of regular or special duty." See Rule 54 § 12, included herein as Appendix A. In addition, the mere fact that the appellants have to work in excess of their regularly scheduled tours of duty may not be construed as punishment because the Collective Bargaining Contract between the Boston Police Patrolmen's Association and the City of Boston permits the police commissioner to order a patrolman to perform compulsory overtime duty. See Appendix B. Therefore, the only aspect of punishment for this duty is the fact that it will be performed without pay. Should appellants' appeal to the Civil Service Commission, provided for in Mass. Gen. Laws c. 31, § 43(*b*) or judicial review, provided for in Mass. Gen. Laws c. 31, § 43(*d*), prove successful, the harm to the appellants is clearly repairable in the future simply by paying appellants for the work they performed. Therefore, the appellants have not and can not demonstrate the existence of irreparable injury which is a necessary element for the issuance of an injunction under the common law.

In addition, this Court has recently ruled that a discharge will not form the basis of irreparable injury. *Sampson* v. *Murray,* 415 U.S. 61, 92, 94 S. Ct. 937, 953 (1974). Clearly, punishment duty is less injurious than a discharge and may not form a basis for finding or irreparable injury.

Punishment duty is specifically authorized by statute, Mass. Gen. Laws c. 31, § 43(*g*). The imposition of punish-

ment duty has been affirmed in several decisions of the Supreme Judicial Court of Massachusetts. *Haywood* v. *Municipal Court of City of Boston,* 359 Mass. 760, 271 N.E. 2d 591 (1971). *Costa* v. *District Court of Eastern Essex,* 305 Mass. 85, 25 N.E. 2d 172 (1940). Although the issue presented in each of those cases was limited to the scope of review permitted by the courts, the Supreme Judicial Court of Massachusetts did not even question the validity of imposing such duty.

B. The Court does Not have Jurisdiction because the Appellants have an Adequate Administrative and Judicial Remedy Afforded by the Civil Service Laws.

Appellants have appealed the order that they work extra duty without pay to the Massachusetts Civil Service Commission, where their case is currently pending. In *Soldevila* v. *Secretary of Agriculture,* 512 F. 2d 427, 430 (1st Cir. 1975), the court stated:

> "The strong policy against enjoining incomplete agency actions, which is reinforced by the equity policy against enforcing personal service contracts and the disruptive effect of granting temporary relief in such cases, requires an extraordinary strong showing of irreparable harm to warrant a preliminary injunction. *Sampson* v. *Murray,* 415 U.S. 61 . . . (1974)."

The plaintiff may nor circumvent or supplement the remedies afforded him by G.L. c. 31. Under Chapter 31 the plaintiff is afforded three ways of appealing a decision to impose discipline: (1) request a hearing before the Massachusetts Civil Service Commission pursuant to § 43(*b*); (2) file a complaint with the Commission alleging procedural violations pursuant to the second paragraph of Mass. Gen. Laws c. 31, § 46A; or (3) file a complaint in

the Massachusetts Supreme Judicial Court or the Superior Court alleging procedural irregularities pursuant to the first paragraph of § 46A. These are the only remedies available to the plaintiff; see *Police Commissioner of Boston* v. *Ciccolo,* 356 Mass. 555, 254 N.E. 2d 429 (1969). The Massachusetts Supreme Judicial Court has repeatedly ruled that an employee who has been disciplined is required to follow the statutory scheme and may not file a complaint for an injunction, mandamus or declaratory judgment. *Brouillette* v. *Worcester,* Mass. Adv. Sh. (1974) 183, 306 N.E. 2d 252. *Bergeron* v. *Superintendent, Fernald State School,* 353 Mass. 331, 231 N.E. 2d, 379 (1967). This doctrine has been uniformly applied in analogous situations in which a plaintiff has an administrative remedy. See *East Chop Tennis Club* v. *Massachusetts Committee Against Discrimination,* Mass. Adv. Sh. (1973) 1611, 305 N.E. 2d 507.

Numerous federal decisions have held that a plaintiff may not seek federal judicial relief until the available and adequate state remedies have been exhausted. For example, in *Burks* v. *Perk,* 470 F. 2d 163 (6th Cir. 1972), *cert. denied* 412 U.S. 905 (1973), the court held that a civil servant who had an adequate judicial remedy under state law could not seek federal relief. The First Circuit has also held that employees may not seek federal relief until the state proceedings are "final." See *Raper* v. *Lucey,* 488 F. 2d 748, 751 n.3 (1st Cir. 1973), construing *Beattie* v. *Roberts,* 436 F. 2d 747, 748-749 (1st Cir. 1971). In this case the appellants have a remedy under the Civil Service laws of Massachusetts, Mass. Gen. Laws c. 31 §§ 43 *et seq.* Those remedies are established to protect the statutorily protected tenure of public employees. The appellants must fully exhaust any rights they have under Massachusetts law prior to seeking relief from the federal court.

II. The Statute does Not Deny the Appellants Equal Protection because the Statute Bears a Rational Relationship to Policemens' Jobs.

This court recently reaffirmed that equal protection analysis requires strict scrutiny only when the statutory classificaion "interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Board of Retirement* v. *Murgia* 44 U.S.L.W. 5077, 96 S. Ct. 2562, 2566 (1976). In addition, the *Murgia* decision specifically held that governmental employment is not a fundamental right. See also *Bishop* v. *Wood,* 44 U.S. 4820, 96 S. Ct. 2074 (1976). Police officers and firemen, the class of governmental employees to whom the statute applies, do not constitute an inherently suspect class such as "alienage," "race" or "ancestry." *Massachusetts Board of Retirement* v. *Murgia,* 96 S. Ct. at 2566 n.4.

> "[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 28, 93 S. Ct. 1278, 1294 (1973).

The constitutionality of Mass. Gen. Laws c. 31, § 43(*g*), must be determined in light of the presumptive validity of statutes promoting aims within the State's police power. "[T]he question is not . . . whether the State can 'establish' a 'genuine public need' for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on petitioner's method of organizing its police force, and the safety of persons and property." *Kelley* v. *Johnson,*

44 U.S.L.W. 4469 96 S. Ct. 1440, 1446 (1976) (*sub nom. Barry* v. *Dwen*). The Three Judge Court properly applied the rationality standard in holding that Mass. Gen. Laws c. 31 § 43(*g*), which provides that police officers who engage in misconduct may be ordered to perform extra work without pay, is rationally related to the State's purpose of providing effective means for maintaining well disciplined police forces.

A. *The Singling Out of Police Officers does Not Constitute a Violation of Equal Protection.*

This Court has affirmed the constitutionality of rules, regulations or statutes which single out police officers. In *Detroit Police Officers Association* v. *Detroit,* 405 U.S. 950, 92 S. Ct. 1173 (1972), this Court dismissed for failure to present a substantial federal question an appeal from the Michigan Supreme Court holding that a municipal residency requirement that applied only to police officers was valid. The Michigan Supreme Court opinion stated: "The job of a policeman does have 'naturally distinguishing characteristics' from all other city employees." *Detroit Police Officers Association* v. *Detroit,* 385 Mich. 519, 190 N.W. 2d 97 (1971). Recently this Court reaffirmed that statutes which single out police officers are not irrational and do not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. *McCarthy* v. *Philadelphia Civil Service Commission,* U.S. , 96 S. Ct. 1154 (1976). In *Kelly* v. *Johnson, supra,* the Court upheld a departmental rule regulating the hair length of police officers. In *Murgia, supra,* the Court upheld the constitutionality of a Massachusetts statute providing a mandatory retirement age for State police officers — although that age was lower than the mandatory retirement age for other Massachusetts employees, and lower than the statutorily

provided mandatory retirement ages for State police officers in other states.

The Massachusetts Supreme Judicial Court has also affirmed the constitutionality of rules, regulations or statutes which single out police officers. In *Boston Police Patrolmens Association, Inc.* v. *Boston,* Mass. Adv. Sh. (1975) 979, 987, 326 N.E. 2d 314, 319, the court affirmed the validity of a rule requiring police officers who are candidates for public office to take a leave of absence. That court held:

> "So far as it is contended that there is a denial of equal protection of laws because the rule does not extend beyond the police department, the contention borders on the frivolous."

B. *Since a Police Force Is a Highly Sensitive and Disciplined Organization the Police Commissioner must Exercise Greater Control over Its Members Than Public Employers Exercise over Non-Police Employees.*

It is necessary that a police department be a highly disciplined force. In *Stradley* v. *Andersen,* 478 F. 2d 188, 190 (8th Cir. 1973), the court stated:

> "Traditionally, the policeman has been a highly trained officer who is entrusted with a responsible and oftentimes dangerous role as a public servant. His work habits on active duty require disciplined conduct, regimentation and frequent strict adherence to regulation and authorized detail. His job is often a delicate and difficult task to lawfully act against those who are sometimes unwilling to recognize any rules or ethics. It is essential that a policeman's training be such that he be taught to obey strict disciplinary procedures and rules in order to lend practical assurance that he will follow command and not abuse his awesome authority."

The legislature has empowered the Police Commissioner to use a variety of sanctions, including reprimands, suspensions, demotions, punishment duty and discharge, to insure that the police department is a well disciplined, effectively functioning body.

C. *The Interest and Right of the Government in Providing a Disciplined Police Force Is to Be Balanced against the Rights of Individual Police Officers.*

The extent of control which any public employer may exercise over private acts of a public employee involves a balancing test. In *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968), the Court stated:

> " '[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' *Keyishian* v. *Board of Regents, supra,* at 605-606 [17 L. Ed. 2d at 642]. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulations of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."

Therefore, even when non-police employees are exercising the fundamental liberties of free speech, the court will balance that exercise against the interest of the employer.

In *Kelley* v. *Johnson, supra,* after noting recent decisions upholding substantial restrictions on the First Amendment rights of federal and state employees, the Court stated:

> "If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulation of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment." 44 U.S.L.W. 4469, 96 S. Ct. 1440, 1445 (1976).

The specialized nature of police work is also a circumstance to be taken into account. In *Muller* v. *Conlisk,* 429 F. 2d 901, 904 (7th Cir. 1970), the court indicated that the *Pickering* balancing test is applicable to police departments, and the fact that policemen are involved may "influence the balance which *Pickering* says must be struck in each case."

The justification for imposing punishment duty upon police officers is the need for a highly trained and disciplined force. Therefore, there is a public need for such a disciplinary tool. On the other side of the balancing test, the imposition of punishment duty does not impose an undue burden on the police officers. They have a full administrative review which, if successful, will adequately protect them. Also, they cannot be required to perform any onerous duties beyond the scope of their employment as police officers. In addition, they will only work a few hours of this duty per week.

Conclusion.

If the appellants had been suspended for two weeks, they and their families would have lost approximately five hundred dollars in pay. This loss would have been immediate, and the appellants would have to successfully appeal that suspension to the Civil Service Commission and the courts in order to receive those lost wages. It is extremely doubtful that the appellants would have sought an injunction against

what is recognized to be the usual and ordinary procedure under c. 31. However, the appellants will not suffer such a loss of pay, but merely must work several extra hours a week. The decision of the police commissioner to impose extra punishment duty prevented the appellants or their families from suffering an immediate and severe financial loss. If the punishment duty is enjoined, the police commissioner will have little alternative but to utilize suspensions rather than extra punishment duty even in situations in which it would be more equitable and fair to have imposed punishment duty.

Respectfully submitted,

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Appendix A.

Rule 54 of the Rules and Regulations of the Boston Police Department.

12. Punishment duty for a member of the department shall be performed under the direction of his commanding officer. Whenever any portion of the punishment duty as ordered has been performed, the officer assigning it shall report to the superintendent in the next daily mail the name of the man, the number of hours and the character of the work done; and when the sentence has been completed he shall so certify in such form as the superintendent shall prescribe. Punishment duty shall be in addition to all regular and extra duty, and no man under punishment shall be on that account relieved of any regular or extra work which he otherwise would have done. Punishment duty must be useful, whether as an addition to the effective strength, or as a relief for other men who have worked hard and faithfully. Commanding officers are warned to be especially careful that no suggestion of favoritism shall attach to their assignments or reliefs. Punishment duty must be so assigned that the man under punishment shall not suffer undue fatigue or be otherwise unfitted for his regular or extra work; and except with his written consent, he shall not be compelled to do more than seven consecutive hours of punishment duty at any time, or more than fourteen hours in four consecutive days, or more than twenty-one hours in seven consecutive days. Neither shall he be compelled, without his written consent, to perform such duty within two hours before or after a tour of regular or special duty.

Appendix B.

COLLECTIVE BARGAINING CONTRACT.

Section 2. Scheduling of Overtime. In emergencies or as the needs of the service require, employees may be required to perform overtime work. Employees shall be given as much advance notice as possible of overtime work. Scheduled overtime shall be posted and distributed to all employees on an equitable and fair basis, in the same manner as set forth in Article XII hereof. Employees, other than those required to work beyond their normal tour of duty due to the exigencies of their workday (such as a late ambulance run, etc.), shall have the option of declining offered overtime, but in the event that sufficient personnel do not accept such offered overtime on a voluntary basis, or in the event of emergency situations where time is of the essence in executing the overtime job, such additional personnel as are deemed necessary by the City may be required to work overtime on an assigned basis. All employees shall be afforded the opportunity to accept overtime service, but there shall be no discrimination against any employee who declines to work overtime on a voluntary basis. The Department will seek to avoid assigning overtime (as contracted with voluntary overtime) to employees working a "short day", so called, on days off, or working with night platoons who are required to attend court, etc. (see Article X) between their tours of duty or on days off, so that such employees may be afforded every opportunity for required rest or to attend to their personal business before and after working hours or on a day off.

Appendix C.

MASS. GEN. LAWS c. 31, § 43(*g*).

(*g*) Punishment duty shall not be imposed without cause upon any police officer or fire fighter subject to this chapter. A police officer or fire fighter upon whom punishment duty is imposed shall, within twenty-four hours of the imposition of such punishment duty, be given a copy of this section and of section forty-five, together with a written notice stating the specific reason for the imposition of such punishment duty and the duration thereof and informing him that he may, within forty-eight hours of receipt of such notice, request in writing a hearing by the appointing authority, and if he so requests he shall be given a hearing within five days of receipt of such request by the appointing authority. A copy of the notice of imposition of punishment duty shall be forwarded forthwith to the personnel administrator. Whenever such hearing is given, the appointing authority shall give the police officer or fire fighter upon whom the punishment duty is imposed a written notice of his finding within two days after the hearing. If, after such hearing, the appointing authority finds no just cause exists for the imposition of punishment duty, such punishment duty shall be deemed not to have been imposed; if, after such hearing, the appointing authority finds that just cause does exist for the imposition of punishment duty, the police officer or fire fighter upon whom the punishment duty is imposed may appeal to the commission as provided in paragraph (*b*), and he or the appointing authority shall be entitled to judicial review of the action taken by the commission as provided in paragraph (*d*). The provisions of paragraph (*c*) shall apply to all hearings under this paragraph. Notice of any action taken by the appointing authority under this paragraph shall be forwarded forthwith to the personnel administrator.